95-1658

(1)

Supreme Court, U.S.
FILED
APR 15 1996
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

DOUGLASS H. BARTLEY,

Petitioner,

v. Docket No._____

TOMMY G. THOMPSON,

Governor of Wisconsin,
in his individual capacity,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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THE ISSUES

1. **FREE SPEECH: Are judges entitled to it?** May political authorities remove a judge from office solely in retaliation for his having refused to cave in to their illegal, ex parte demands and threats that he rule in their favor or risk being fired?[1] And where the case causing the judge's ouster involves tax refunds for 25,000 plaintiffs and $150 million of state liability, was the judge, in certifying the plaintiffs as a class and authorizing refunds should they win, speaking on a matter of public concern within freedom of speech? Or is the judge not entitled, because he was not speaking as a citizen?

The trial court and the court of appeals held judges not entitled to freedom of speech, because in doing their jobs, they do not speak as citizens. The Wisconsin Supreme Court denied review.

2. **DUE PROCESS: May courts dismiss pleadings just because they don't believe the allegations?** Is a pleader, who has alleged all facts

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[1] The word "illegal" is not argumentative, for the ex parte threats the complaint alleged must, on a motion to dismiss, be assumed to have happened, Evans v. Cameron, 121 Wis. 2d 421, 426 (1985); and those threats are plainly illegal under Wisconsin law. See §227.50(1)(a), WIS. STATS., (infra at 2). For the same reason, "solely" is accurate, because the court of appeals purported to assume, as it had to on the governor's motion to dismiss, the truth of Bartley's allegations that the governor removed Bartley solely because of Bartley's rulings against the state in Hogan v. Wisconsin Department of Revenue, ¶203-336 (1992), ¶203-377 (1992), ¶203-397 (1993), Wis. Tax Reptr. CCH.

underlying an obstruction of justice conspiracy, entitled to the opportunity to present evidence to prove the allegations?

The trial court and the court of appeals found plaintiff's allegations too "speculative" and dismissed the obstruction claim on motion to dismiss. The Wisconsin Supreme Court denied review.

3. PROPERTY RIGHTS: Legality of indirect state "repeal" of federal constitutional right? May a state court revamp state contract law so as to abrogate a public employee's contract and thereby negate his Board of Regents v. Roth civil rights action?[2]

The trial court and the court of appeals held plaintiff had no contract; therefore there was no property rights' deprivation. The court of appeals also held office holders have no property rights in their jobs, even if otherwise contractually promised them. The Wisconsin Supreme Court denied review.

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[2] 408 U.S. 564 (1972).

PARTIES TO THE PROCEEDINGS

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I. OFFICIAL AND UNOFFICIAL REPORTS OF CASE

Wisconsin Court of Appeals: 198 Wis.2d 323 (1995); 542 N.W.2d 227.

Wisconsin Supreme Court (denying review): (not yet reported——see App. 1.)

II. JURISDICTIONAL BASIS

1. The date of entry of judgment denying review in the Wisconsin Supreme Court was January 16, 1996.

2. There was no order respecting rehearing of the Wisconsin Supreme Court's denial of review. Nor was there any order granting an extension of time to file the petition for a writ of certiorari.

3. There will be no cross-petition for review.

4. Jurisdiction is based on 28 U.S.C. §1257(a).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution:

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

Fourteenth Amendment:

> "Nor shall any state deprive any person of . . . property, without due process of law . . . ."

Article I, Section 10:

> **"No state shall . . . pass any . . . law impairing the obligation of contracts".**

Federal Statutes:

42 U.S.C. §1983:

> **"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."**

Wisconsin Statutes:

Section 227.50(1)(a):

> **"In a contested case, no ex parte communication . . . or threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employee of the agency who is involved in the decision-making process, by: 1. An official of the agency . . .; or 2. A party to the proceeding . . . ."**

IV. STATEMENT OF THE CASE

1. The proceedings. The action is for breach of contract, conspiracy to obstruct justice in violation of Wisconsin statutes, and deprivation of constitutionally-protected speech and property rights under 42 U.S.C. §1983. Bartley filed suit on March 3, 1994. (A. 34-84.)[1] The governor moved to dismiss on April 18, 1994. (A. 85-131) The trial court granted the motion on October 28, 1994. (App. 3; A. 23-33.) And the court of appeals affirmed on August 10, 1995, (A. 1-22.). Bartley petitioned the Wisconsin Supreme Court for review on September 6, 1995. Before the supreme court took any action, however, the court of appeals withdrew its opinion on October 2, 1995, (AA. 1), but affirmed again on November 30, 1995 (App. 2; AA. 2-23). The Wisconsin Supreme Court denied review on January 16, 1996. (App. 1.)

The federal free speech and property rights claims were raised in the complaint, (A. 48-50), in briefs in the trial court (A. 145-153, 191-93), in briefs in the court of appeals (A. 219-229), and in the two petitions for review in the Wisconsin Supreme Court. The trial court denied both claims (App. 3: 10-12; A.

[1] References to the record below are shown as "A. __" or "AA. __". Those references were the ones used in the Wisconsin Supreme Court. The "AA. __" references refer to additional materials used in the Wisconsin Supreme Court on the second petition for review occasioned by the court of appeals having vacated its first opinion. References to the appendix materials included here are shown as "App. __".

23), as did the court of appeals in both opinions. (App. 2: 8-12, 13-19; A. 1-22; and AA. 2-23.)

The due process claim was raised in briefs in the trial court (A. 189), in the court of appeals (A. 237), and in the two petitions in the Wisconsin Supreme Court.[2]

On the free speech claim, the trial court and the court of appeals held that Bartley had no rights of free speech, because in delivering his rulings in Hogan, he wasn't speaking as a citizen. (App. 3: 10-12; App. 2: 13-19)

On the due process claim, the trial judge and the court of appeals denied Bartley the opportunity to go forward and to prove his allegation that the governor was the central figure in the obstruction of justice conspiracy. (App. 3: 9; App. 2: 19-23)

On the property rights claim, the trial court and the court of appeals held Bartley had no contract and therefore had no claim for deprivation of property rights. (App. 3: 6-7; App. 2: 8-10) The court of appeals also held that office holders with contracts have no property rights in their jobs. (App. 2: 10-12)

On all claims, the Wisconsin Supreme Court merely denied review. (App. 1)

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[2] It is true that the words, "due process", were not uttered until Bartley filed his petition for review in the Wisconsin Supreme Court. (See p. 35 of that petition.) However, in both courts below, Bartley argued that the allegations of the governor's involvement in the conspiracy gave him the right to go forward with discovery in the case.

2. Statement of the facts.

(Underscoring shows facts not in court of appeals opinions.)

In December 1991, Governor Thompson, represented explicitly by his chief-of-staff, Ed Marion, induced Bartley, then a part-time tax appeals commissioner with a private law practice, to accept a full-time position on the commission, for which there was a little over one-year left on the term. (A. 36-38.) The governor promised Bartley that if he would give up his law practice, take the position, and not do "anything unnatural with sheep", he would renominate Bartley for a six-year term beginning March 1, 1993. (A. 38.) Bartley accepted, gave up his law practice, and began the work. (A. 38.)

One of the cases later assigned to Bartley was Hogan v. Wisconsin Department of Revenue,[3] case involving some $150 million of tax refund claims by 25,000 federal pensioners claiming discrimination in the taxation of their pensions. (A. 39-40.) Bartley ruled that if the federal pensioners proved discrimination, they could receive refunds and that they could proceed as a class. (A. 39.)

Right after the class action ruling, Bartley received a call from the governor's chief-of-staff,

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[3] Bartley wrote three opinions in that case. See n. 1, p. (i), for citations.

Marion, who told Bartley that the department of revenue was "very upset" with his ruling, a call Marion later characterized as to let Bartley know "which way the wind was blowing" in regard to Bartley's rulings. (A. 45.)

Then, after another ruling on the class action question, (A. 39-40) Bartley received a call from Mark Musolf, the then-recused chair of the tax appeals commission about the ruling. (Musolf was recused for his involvement as secretary of revenue when some of the pension taxes were collected; he had been a defendant in the pension case until dismissed by Bartley.) (A. 40; 323-331; 318-22.) Musolf said, "How can you do this when your reappointment is up——you're making a laughingstock of the commission." (A. 40; 75.) Subsequently Bartley reaffirmed the rulings. (A. 40; 332-348.) In late February 1993, shortly before his interim one-year term was running out, Bartley wrote the governor's office about his salary for the next six years. (A. 40.)

Then in early March, while the pension case was at the merits stage, the governor's personnel director, Pat Reuter, called Bartley and said, "The governor told me to tell you that he was not amused" by the letter and that Bartley's renomination was "not secure". (A. 40.) Bartley reminded Reuter that the renomination had already been promised, and Reuter replied that she would get back to Bartley. (A. 40.)

The pension case was still then very active. (A. 76-77.) In early March, right after Bartley's

conversation with Reuter, Bartley had to issue an order to Mark Bugher, secretary of the department of revenue and a Thompson appointee, under threat of sanctions, to provide the pensioners with information which the department had previously agreed to provide, a promise on which the department had reneged. (A. 76-77.)

A day or two later, Marion, returning a call Bartley had placed just after talking to Reuter, confirmed that Bartley indeed had been promised the renomination and told Bartley he had told Reuter the same thing. (A. 41.) Marion said he would that evening remind the governor of the promised renomination. (A. 41.)

Bartley waited for word. (A. 41.) Three weeks later Reuter asked Bartley to attend an interview in Madison with the governor's legal counsel and the state treasurer, among others, concerning his "goals and objectives". (A. 41.) Bartley asked Reuter whether Marion hadn't confirmed the renomination promise. Reuter said, "Not exactly." (A. 41.)

Surprised at the interview request, Bartley at first accepted, but over the next 24 hours ruminated on it. (A. 42.) The "interview request" about his goals and objectives at first baffled Bartley——Bartley's performance for six years on the TAC was well known to the governor. (A. 42-43.) Trial judges, appeals judges, private practitioners, and members of state and federal agencies had written the governor praising Bartley's exceptional

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performance as a commissioner. (A. 43; 59-71.) In December 1991, the governor had praised Bartley for his "proven skills and dedication." (A. 43.) And the Wisconsin Supreme Court had spoken highly of Bartley, quoting him approvingly in two opinions.[4]

Fearing that he was going to be grilled with more ex parte communications on the pension case, and wondering why he had to be interviewed for a job he had already been promised and which he had held for some six years prior, by fax about 72 hours before the "interview", Bartley declined the invitation unless and until he was given confirmation of the promise of renomination. (A. 42.) Bartley was by then convinced he was not going to be renominated and that the interview was window dressing for a decision the governor had already made to appoint another. (A. 42.)

The governor's office never responded to the question of the prior renomination promise, but instead, by fax delivered just two hours before the meeting, insisted Bartley attend, threatening to "proceed accordingly" if Bartley didn't show. (A. 42.) But that same afternoon, Musolf told Bartley that Mark Bugher, the secretary of revenue, was "very unhappy" with Bartley because of the pension case. (A. 43.)

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[4] See William Wrigley, Jr., Co. v. Wis. Dept. of Revenue, 160 Wis. 2d 53, 465 N.W. 2d 800, 812 (1991); see also Cleaver v. Wis. Dept. of Revenue, 158 Wis. 2d 734, 463 N.W. 2d 349, 352 (1990).

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As it turned out, Bartley was right in believing he was going to be fired, for during the same week Bartley was contacted about his "goals and objectives interview", the governor had already recruited Joseph Mettner, a former assistant to the governor and a lawyer who represented the department of revenue in the pension case, for the job. (A. 43-44.) Mettner was officially nominated two days later, and confirmed some seven weeks later, by a straight party line vote in the state senate, 17-16. (A. 45.) After the Mettner nomination was announced, Bartley recused himself from the pension case. (A. 44; 72-80.)

V. CRITERIA SUPPORTING SUPREME COURT REVIEW

1. The court of appeals decision on the free speech issue irreconcilably clashes with the decision of the U.S. Supreme Court in Mt. Healthy City Board of Education v. Doyle,[5] holding that the plaintiff's free speech claims were not defeated because of his lack of tenure. Thus free speech claimants do not need job contracts to win free speech claims. Yet the court of appeals held that Bartley's alleged lack of contract defeated his claim.[6]

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[5] 429 U.S. 274 (1977).

[6] App. 2: 17.

2. The court of appeals decision dismissing the obstruction claim before discovery and before hearing irreconcilably clashes with Mathews v. Eldridge,[7] requiring "some form of hearing . . . before an individual is finally deprived of a property interest," and with Goldberg v. Kelly,[8] holding "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."

3. The court of appeals decision on the property rights issue irreconcilably clashes with a long line of United States Supreme Court cases beginning, most notably, with Board of Regents v. Roth, holding that a government employee has a property interest in his job when he has "a legitimate claim of entitlement to it".[9] In flat contradiction of Roth and state law, the court of appeals held public officers have no contract or property rights in their offices.[10]

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[7] 424 U.S. 319, 333 (1976).

[8] 397 U.S. 254, 269 (1970).

[9] 408 U.S. 564, 577 (1972).

[10] App. 2: 11-12.

VI. ARGUMENT

1. FREE SPEECH ISSUE——Political authorities may not remove a judge from office solely in retaliation for the judge having refused to cave in to their ex-parte threats that he rule in their favor or risk being fired.

Both the trial judge and the court of appeals, relying on Pickering v. Board of Education,[11] held that Bartley was not entitled to invoke the First Amendment, because in making his rulings in the pension case, Bartley was not speaking as a citizen, but as a tax judge, and was not speaking on a matter of public concern.[12]

Apart from the fact that judges cannot carve out exceptions to the First Amendment, and that the "logic" of the rulings is that storm troopers could bind and gag a judge as he was delivering a ruling in his courtroom, the rulings have no legal support. There are no cases that say Bartley had to be speaking as a citizen to be entitled to First Amendment protection; nor is there any basis for saying that Bartley wasn't speaking on a matter of public concern.

To take the public concern aspect first, to say that the pension case, involving some 25,000

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[11] 391 U.S. 563 (1968).

[12] App. 3: 10-12; 2: 13-19.

pensioners seeking $150 million in tax refunds, is not a matter of public concern needs little comment. The case was the biggest both monetarily and in numbers of people directly involved in the history of the state.[13]

Turning to the "as a citizen" question, the rulings that Bartley had to be speaking as a citizen are not supported by any cases. Pickering says nothing of the sort. It does not say that the plaintiff must first establish that he was speaking as a citizen, as opposed to an employee:

> "[T]he state has interests as an employer in regulating the speech of its employees . . . . The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[14]

The "as a citizen" language was merely descriptive of the law in terms of the facts of the case then at hand (plaintiff was a teacher complaining about the school board); it does not impose any requirement that the teacher or employee actually be speaking in his capacity as a

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[13] That assertion made below (A. 225-26) was not challenged.

[14] Pickering, 391 U.S. at 568.

citizen as opposed to his capacity as an employee, if such an elusive distinction could somehow ever possibly be made.

And there is nothing in post-Pickering cases establishing any requirement that the plaintiff be speaking as a citizen to be eligible to claim freedom of speech.

The trial judge and the court of appeals both cited two federal cases in support of their decisions that Bartley had to be speaking as a citizen to raise the speech issue. Neither applies.

In Egger v. Phillips,[15] a complex Pickering-type balancing case, the court upheld the forced transfer of a discontented FBI agent where, the court stressed, the agent's comments had created internal havoc at the bureau. In Marquez v. Turnock,[16] the court also applied balancing to sustain the forced transfer of an employee whose comments were taken as threatening (to use the words of Pickering) "its interests . . . in regulating the speech of its employees" and its "interest . . . as an employer, in promoting the efficiency of the public services it performs through its employees."[17] Neither case really turned on whether the employee was speaking as a citizen.

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[15] 710 F.2d 292 (7th Cir. 1983).

[16] 967 F. 2d 1175 (7th Cir. 1992).

[17] Pickering, 391 U.S. at 568. (Emphasis added)

In any event, there is no balancing to be done here for two reasons. First, unlike Pickering, Egger, and Marquez, the governor here had no legitimate interest, but only an illegal interest, in "regulating" Bartley's speech with threats of termination. Indeed the "regulating" that was tried was an explicitly illegal act, akin to jury tampering.[18] As Chief Justice Warren once said, "Free speech is not to be regulated like diseased cattle and impure butter."[19]

For another, Bartley's ruling neither created havoc at the commission nor disrupted its effective functioning. To the contrary, Bartley's rulings greatly enhanced the efficiency and functioning of the commission: had he ruled otherwise, the 25,000 taxpayers and one remaining commissioner[20] would have been faced with 25,000 separate trials, tying the commission, the pensioners, and all other taxpayers with tax disputes, up for years and years.

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[18] Section 227.50(1)(a), WIS. STATS: "In a contested case, no ex parte communication . . . or threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employee of the agency who is involved in the decision-making process, by: 1. An official of the agency . . .; or 2. A party to the proceeding. . . ." The governor through his department of revenue is a party to every tax appeals case, including Hogan.

[19] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447 (1957) (dissenting).

[20] See A. 84. The recusal of Musolf, Bartley's recusal, and Mettner's disqualification left the very capable, but not superhuman, Commissioner Timken as the only commissioner eligible to hear the 25,000 cases necessitated.

The court of appeals also erred in holding:

> "We have concluded that Bartley's allegations that he had a contract for renomination . . . fail to state a claim. And if we were to hold, as Bartley urges, that the governor's decision not to renominate him for another term is constitutionally impermissible, no appointed official could be dismissed, or denied reappointment, on the basis of his or her performance in the job."[21]

The court went on to say that the governor can appoint whomever he wants for whatever reasons and that politics "'ain't beanbag.'"[22]

The "no contract-no free speech rationale" absolutely contradicts settled law, most notably Mt. Healthy District Board of Education v. Doyle,[23] where the U.S. Supreme Court held the untenured plaintiff's free speech claims were not defeated because of his lack of tenure. If the employee can show that the firing was reprisal for his exercise of his free speech rights, he may not be fired. He doesn't need a contract:

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[21] App. 2: 17.

[22] App. 2: 19.

[23] Mt. Healthy, 429 U.S. 274 (1977).

> "Even though [plaintiff] could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of . . . First Amendment freedoms."[24]

The court of appeals' ruling need be reversed to protect judicial integrity, the sort the U.S. Supreme Court recently addressed:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising [his] authority . . . shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."[25]

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[24] Id at 283-84.

[25] Bradley v. Fisher, 80 U.S. 335 (1872), quoted in Antoine v. Byers & Anderson, 113 S. Ct. 2167, 124 L.E. 2d 391, at n. 10. (1993). (Emphasis added.)

When a tax judge or any other judge is doing his or her job, his speech is always a matter of public concern, arguably far more important than a letter he might write as a citizen, say, criticizing the school board; for the integrity of the judicial process depends on his being free to "act . . . without apprehension of personal consequences to himself."

2. THE DUE PROCESS ISSUE——Courts may not dismiss pleadings, just because they don't believe the allegations.

After he had ruled that the 25,000 retirees could proceed as a class, Bartley received a phone call from Musolf, the chairman of the tax appeals commission who had had to recuse himself from the pension case, because he had been a defendant. Referring to Bartley's ruling, Musolf told Bartley, "How can you do this when your reappointment is up——you're making a laughingstock of the commission." (Musolf also told Bartley later that he knew Mark Bugher, secretary of revenue was "very upset" with Bartley's rulings in the case.)

In his complaint Bartley alleged that Musolf's "How can you do this" call was instigated by the governor as part of an obstruction of justice conspiracy to get Bartley to throw the pension case.[26] But the trial judge, on the governor's motion

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[26] A. 35; 47.

to dismiss, flatly rejected the allegation and dismissed the claim:

> "Bartley's conspiracy claim is little more than a conclusory allegation of conspiracy built upon mere speculation regarding what could motivate Musolf to make such a statement."[27]

The court of appeals agreed:

> "Bartley . . . asks us to speculate. * * * 'Mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not <u>necessarily</u> establish the existence of a conspiracy.' Wis J I——Civil 2800 (1991)."[28]

A reasonable opportunity to present one's claims is a fundamental right universally prescribed in all systems of law established in civilized countries.[29] The fundamental requisite of due process . . . is the opportunity to be heard."[30] Due

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[27] App. 3: 9.

[28] App. 2: 23-24. (Emphasis added.)

[29] <u>Twining v. New Jersey</u>, 211 U.S. 78, 111 (1908).

[30] <u>Grannis v. Ordean</u>, 234 U.S. 385, 394 (1914).

process requires "[s]ome form of hearing before an individual is finally deprived of a property interest."[31] In cases where there are issues of fact, due process requires "an opportunity to confront and cross-examine adverse witnesses."[32]

From those basic precepts, it necessarily follows that due process requires that plaintiffs be given an opportunity to prove, and have a hearing on, their well-pleaded allegations; and precludes courts from depriving plaintiffs of their rights to confront and cross-examine.

Here both the trial court and the court of appeals deprived Bartley of any opportunity to gather evidence through discovery, to confront and cross-examine Governor Thompson and other adverse witnesses, and to present evidence to a jury. Bartley's complaint alleging Thompson's involvement in all obstruction conspiracy presented an issue of fact that required, as a matter of due process, the court to allow Bartley to go forward. In short, due process prohibits courts from acting as uninvited fact-finders.

Both courts committed especially egregious errors, for both, without benefit of trial, made improper jury determinations, holding that as a matter of fact, Musolf and Thompson did not

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[31] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[32] Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

collaborate——a finding of fact contrary to Bartley's allegation that Thompson had directed Musolf to make the threatening call to Bartley,[33] or had instigated it, an allegation that, as a matter of law and fact, had to be accepted as true for purposes of the governor's motion to dismiss.[34]

And the fact that the court of appeals cited a jury instruction only hints at the error here. Here that court went on to ignore its own instruction to itself. The instruction uses the qualifier "not necessarily"——but the court of appeals held that Musolf and Thompson, as a matter of adjudicated fact, "necessarily" had no connection, thus rejecting Bartley's contrary allegation on the grounds it didn't believe it.

If the court of appeals is going to act as a jury, the least one is entitled to expect is that it consider the jury instruction in making its decision. An allegation may be dismissed only if it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.[35] But the court of appeals in effect said that it was a certainty that the governor was not involved.

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[33] The complaint alleged that all the ex parte communications were made by the governor. A. 35; 47.

[34] Evans v. Cameron, 121 Wis.2d 421, 426 (1985).

[35] Strid v. Converse, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983).

In reality, however, the only things that are "conclusory" or "speculative" about the Musolf-Thompson connection are both courts' conclusory and speculative dismissals of any Thompson-Musolf connection without in any way coming to grips with any of the inferences supporting the connection that Bartley drew in briefing.

Among other things, the judges ignored the fact that only the governor, not Musolf, has the power to nominate tax commissioners, and Musolf couldn't meaningfully threaten Bartley——therefore Musolf's threat was likely not his own; ignored the content of the call——how would Musolf have known Bartley was in jeopardy without contact with the governor's office?; ignored the fact that judges, such as Musolf, don't normally intervene in cases from which they have had to recuse; and that Musolf's illegal intervention suggests overwhelming external pressure on him, most likely from the man to whom he owed his own appointment, the governor.

The courts below also ignored what happened before and in the aftermath of the Musolf call, namely the other ex parte contacts directly from the governor's office (Marion——to let Bartley know "which way the wind was blowing"), from Musolf again (telling Bartley governor's own secretary of revenue was "very unhappy" with Bartley), and from the governor himself (speaking through Reuter that he was "not amused" with Bartley and that Bartley's appointment "was not secure"), as well as other

subsequent events.[36]

But that's all really beside the point——it's not necessary to get into inferences about a defendant's role in a conspiracy when a plaintiff has flatly alleged that the defendant was directing the conspiracy. As a matter of due process, the plaintiff is always entitled to an opportunity to prove any well-pleaded allegation. And the court may not dismiss the complaint just because it doesn't believe the allegation.

3. THE PROPERTY RIGHTS ISSUE——State courts may not revamp state contract law so as to abrogate a public employee's contract and thereby negate his Roth civil rights action.

The trial court held that because Bartley had no contract, he had no constitutionally protected property right. The court of appeals agreed, but also held that public officers under contract can have no contract or property rights in their offices, in the process effectively overruling Board of Regents v. Roth and progeny.[37] The ultimate issue here is whether a state court can abrogate a public employee's contract and thus defeat his Roth claim.

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[36] See pp. 30-33 Bartley's Revised Petition for Review in the Wisconsin Supreme Court, for a discussion of all the inferences.

[37] 408 U.S. 564 (1972); also overruling State v. Verage, 177 Wis. 295, 299, 187 N.W. 830, 832 (1922) ("In this state, public office is regarded as a property right.").

The immediate issue is whether Bartley had a contract. He did.

It is absolutely clear that under Wisconsin law, at least before the case was decided, Bartley had a contract and therefore a "legitimate expectation" of continued employment.

In holding that Bartley didn't have a contract, the trial judge said that Bartley's promise to give up his law practice was not legal consideration:

> "[A] promise to do something which the promisor is already legally obligated to do does not constitute consideration for a contract."[38]

One doesn't really even need to deal with the law practice termination as consideration at all,[39] for Bartley's performance of the other part of his renomination bargain with the governor, satisfactory

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[38] App. 3: 6. (Emphasis added.) The judge gave no reasoning, however, by which he applied that principle.

[39] Bartley's agreement to give up his law practice was, of itself, consideration, for at the time Bartley agreed to give up the practice, he was not "already legally obligated" to do so. It wasn't until later, on January 1, 1992, when he began serving full-time, that he became legally obliged to give up the practice. It is true that an agreement to perform a "pre-existing duty" is not consideration. Corbin, Contracts, Vol. 1A, §171. A pre-existing duty, however, is one that is "antecedent to the promise for which consideration is being sought and of which enforcement is asked." Id. Here Bartley had no antecedent obligation to quit practicing law. That obligation arose only after the agreement was made.

performance on the job, was "enough" consideration to support the contract, an issue that neither court addressed.

Even were we to assume Bartley was a professional sunbather at the time the promises were exchanged, there still would have been consideration on his part to form a contract and enforce the governor's promise.[40]

Consideration can be either the promise of performance or the performance itself:

> "(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise . . . . or (c) the creation, modification, or destruction of a legal relation."[41]

Translated into the case at hand, and leaving

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[40] The governor's promise to Bartley was the equivalent of a job contract. Here, the difference between a property right to be renominated and a property right to employment is inconsequential. The governor's promise to renominate was a virtual guarantee of continued employment for a number of reasons, primarily because Bartley had been confirmed by the state senate unanimously twice previously. For further discussion, see A. 145-49.

[41] RESTATEMENT 2d, CONTRACTS, §71.

aside the law practice question, the consideration bargained for by the governor in exchange for his renomination promise to Bartley, and given by Bartley, was Bartley's promise of performance of the work in a satisfactory manner, his actual performance in a satisfactory manner, and the creation of a new legal relation between Bartley and the state, where Bartley would work full-time on the commission forsaking all other work.

Bartley's job performance alone was consideration. The situation parallels the classic, first-year contracts example of the uncle telling the nephew, I will pay you $5,000 if you refrain from smoking, drinking, cards, billiards, and swearing until you are 21. The nephew abstains. He is entitled to be paid, because he completed the requested performance.[42]

Bartley's case parallels. Bartley agreed to accept the job on the condition that he be paid the agreed sum and on the condition that he be renominated after the first term expired. Bartley promised to perform and did perform. He was contractually entitled to be renominated.[43]

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[42] Hamer v. Sidway, 124 N.Y. 538, 27 N.E. 256 (1891).

[43] For a discussion of the other reasons why there was a contract between Bartley and the governor, see Bartley's Revised Petition for Review at pp. 12-20.

The court of appeals affirmed the trial court on the contract issue, but gave a different rationale:

> "The requirement that [Bartley] give up his [law] practice was not one imposed by the governor——the person Bartley claims was the only other party to his 'contract'; it was imposed by legislation * * * The trial court could properly conclude on these facts that [Bartley's] * * * claim failed for lack of consideration."[44]

The reasoning is as bad as the trial court's.

What the court of appeals was saying, apparently, is that Bartley's promise to terminate his law practice and his performance of that promise are not consideration, either because the performance resulted in no benefit to the governor, or because the promise and performance were not sought by the governor. Neither contention is sound.

For one thing, there need be no benefit to the governor; detriment to Bartley was enough.[45] And the forfeiture of the law practice——something Bartley was otherwise entitled to continue——was detriment.

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[44] App. 2: 10.

[45] Black's Law Dictionary, 5th Ed. at 277. Consideration is "benefit . . . to one party . . . or detriment . . . by the other."

For another, the governor did seek the promise to give up the practice. To say otherwise would be the equivalent of saying that governors couldn't care less whether their nominees moonlight in violation of contract. Moreover, "[i]t matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous."[46]

Third, there is no logical distinction between a private contractual provision prohibiting moonlighting and a statutory one. In both cases, the employee puts himself under an obligation to work only for the employer.

Fourth, "consideration * * * may consist of . . . the destructionn of a legal relation."[47] Bartley's termination of his law practice was a destruction of the legal relations between him and his clients.

Perhaps because of the paucity of reason applied in its analysis of the consideration question, the court of appeals went on to hold that any contract Bartley had was void as against public policy:

> "The very nature of the concept of public office and its relation to the public is inconsistent with either a property or a contract right in the office.

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[46] RESTATEMENT 2d, CONTRACTS, §71, comment e.

[47] RESTATEMENT 2d, CONTRACTS, §71.

> * * * The office belongs to the people, not the office holder or the appointing authority. * * * And that is why the law invalidates any 'bargain' made by a public official to appoint a particular person to office."[48]

The statement makes good rhetoric, but it erases the Roth holding that public employees can have a property right in their jobs if they have a legitimate claim of entitlement to it in the form of a contract; and it flatly overrules Wisconsin law.[49] Carried to its illogical conclusion, the court of appeals decision would abrogate seemingly all public employment and perhaps even other public contracts.

Though Roth says that the issue of whether a public employee has a contract (or inferentially a property right)[50] is a matter of state law,[51] logic tells us that a state may not escape its constitutional obligations to its public employees through the ruse

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[48] App. 2. Yet, despite the rhetoric about the office belonging to the people, the court went on to say, "Nomination to office such as tax appeals commissioner are 'political' in that they are wholly discretionary with the governor, and '[p]olitics' as Mr. Dooley said nearly a century ago, 'ain't beanbag'." A. 2: 19.

[49] The statement overrules State v. Verage, 177 Wis. 295, 299, 187 N.W. 830, 832 (1922), holding that a public office is a property right.

[50] A contract right is property. 73 C.J.S. §11.

[51] See Roth, 408 U.S. at 577.

of declaring that public employees don't have contract rights.

That sort of logic knows no principled limits. Accepting it would mean that states could avoid federal constitutional commands through the artifice of redefinition. Political speech could be negated by redefining "speech" so as to exclude political rallies; the Establishment Clause could be abrogated by redefining "religion" to exclude Episcopalianism, the effect being to make that creed a state "religion"; Fourth Amendment "probable cause" could be recast to mean "the slightest suspicion". And so on.

In this case the court of appeals redefined the constitutional term "property" to exclude public employment contracts. This sort of judicial legislation must be nipped before it takes root generally.[52]

VII. CONCLUSION

Over 100 years ago, Sir Henry Sumner Maine, observed that "the movement of the progressive societies has hitherto been a movement from Status to Contract."[53] The events in this case suggest that

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[52] States are prohibited constitutionally from redefining "contract" however they please. ART. I, §10, U.S. CONST., prohibits states from passing laws "impairing the obligation of contracts." Here the court of appeals violated that clause by legislating away a public employment contract.

[53] Ancient Law, (New York: Henry Holt & Co., 1888) pp. 164-65.

"Status", or as Maine called it, "the Law of Persons", is a constant threat that continues to rear its ugly head.

The outcome of this case will affect not only the sanctity of judicial independence and of contract, but also the ability of litigants to get to the bottom of official law-breaking. And that "ain't beanbag", to use the court of appeals' expression.

The petition for a writ of certiorari should be granted.

Dated this 11th day of April, 1996.

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APPENDIX
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A. 1 1-2 WISCONSIN SUPREME COURT DENIAL OF REVIEW

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You are hereby notified that the Court has entered the following order:

No. 94-3123 Bartley v. Thompson L.C. #94CV745

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner, Douglass H. Bartley, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

A. 2 1-24 WISCONSIN COURT OF APPEALS DECISION

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

DOUGLASS H. BARTLEY,

Plaintiff-Appellant,

v. Case No. 94-3123

TOMMY G. THOMPSON,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

EICH, C.J. Douglass Bartley, a former member of the Wisconsin Tax Appeals Commission, sued Tommy G. Thompson, Governor of Wisconsin, when Thompson failed to nominate him to another term on the commission. He claimed that he had a "binding contract" for renomination, that the failure to renominate him violated his right to free speech, and that Thompson conspired with others to "obstruct" Bartley in the performance of his duties by threatening to deny him renomination after Bartley voted to allow a large income-tax refund claim brought by several thousand federal pensioners to proceed before the commission. We affirm the trial court's dismissal of his action.

Bartley's complaint alleges the following facts.[1] He was appointed to one of two part-time positions on the tax appeals commission in 1987. At that time, the commission was comprised of five members, three of whom served full-time and two part-time. As a part-time commissioner, Bartley was permitted to maintain a private law practice, which he did.

In 1991, the two part-time commissioner positions were eliminated by the legislature and one of the full-time commissioners resigned. Bartley applied for appointment to fill out the remaining year of the former commissioner's term. He met with the Governor's then chief-of-staff, Edward Marion, informing Marion that he would give up his law practice and take the full-time position on the "promise" that he would be renominated for a full six-year term the following year. Several days later, Marion telephoned Bartley and told him that his condition was acceptable and that the Governor "did not want him for just one year." According to Bartley, Marion told him his renomination was secure "as long as [he] didn't do anything unnatural with sheep." He alleges he relied on Marion's statement as a representation that his renomination was "secure."

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[1] For the purposes of a motion to dismiss, the well-pleaded facts are assumed to be true. Evans v. Cameron, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). We thus take the facts pled as admitted for the purpose of this appeal. Id.

A few days later, Bartley received a call from Thompson informing him that he was to be nominated to serve the one year remaining on the term of the former commissioner. According to Bartley, the Governor asked him whether he was "happy" with that appointment,[2] and he responded in the affirmative.

Pending before the commission at the time was a case filed by several thousand retired federal employees living in Wisconsin who claimed the state had illegally assessed income taxes on their federal pensions over a period of several years. The case represented a potential liability for the state approaching $100 million, and Bartley authored the opinions announcing the commission's decisions that it had jurisdiction to hear the retirees' claim and that the retirees could proceed as a class.

After the decisions were announced, Marion telephoned Bartley indicating that the Wisconsin Department of Revenue was "very upset" with the

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[2] While Bartley, in his complaint and at several points in his briefs to this court, refers to the Governor's alleged promise to "reappoint" him to the commission, in fact the Governor's power is one of *nomination*, not appointment. Section 15.06(1)(a), Stats., states that "members of commissions shall be *nominated by the governor*, and with the advice and consent of the senate *appointed* for ... 6-year terms ...." (Emphasis added.) The Governor thus nominates persons for membership on the commission and the "appointment" comes only upon favorable action by the state senate. To the extent the terms "appointment" or "reappointment" may appear in this opinion, they should be considered synonymous with "nomination" and "renomination."

results. Several weeks later, in November 1992, Bartley and another commissioner, representing a majority of the three-member agency, issued further rulings in the case adverse to the state and the department. Bartley alleges that he then received a call from the commission chair, Mark Musolf (who had recused himself from the case due to his prior involvement in the dispute as secretary of the revenue department), during which Musolf remarked: "How can you do this when your appointment is up?" and "You're making a laughingstock of the Commission."

Bartley's initial term as a full-time commissioner was due to expire on March 1, 1993. On February 23, he faxed a letter to the Governor's "personnel director," Pat Reuter, inquiring about his salary for the full six-year term. On March 2, Reuter informed Bartley that the Governor was "not amused" by his letter and that his renomination was "not secure." When Bartley told Reuter that he had been "promised" renomination, Reuter said she would contact the Governor and get back to him.

Bartley then telephoned Marion, who had since resigned his position in the Governor's office and was in private law practice. Unable to reach Marion, Bartley left a message that he wanted to "confirm ... the prior agreement." Marion returned the call a few days later stating that he would "remind" the Governor of Bartley's concerns.

A few weeks later, on March 24, Reuter called to request that Bartley attend an "interview" on Monday, March 29, concerning his reappointment. Reuter stated that the Governor's legal counsel, his appointments director, the state director of employment relations and the state treasurer were scheduled to be present at the meeting and that the purpose of the meeting was to discuss Bartley's "goals and objectives" as a member of the commission.

After initially agreeing to attend the meeting, Bartley changed his mind. He alleges he did so because he believed Reuter and the others wanted to talk to him about the pending pension case, and he felt the interview was just a ruse to justify [a] decision already made not to renominate him because of his rulings in the case. He faxed a letter to Reuter on the Friday before the scheduled Monday meeting stating:

> [W]hen I was appointed to the interim one-year term ... I was promised an additional six-year term beginning this last March 1. Because I was given a seven-year contract, the matter of my reappointment is settled, and I see no good that can come from the Monday meeting, the subject of which is evaluating whether I should be given a job that has already been promised and filled.

Bartley asked Reuter to provide him with a written "confirmation of [his] reappointment," and said that once the confirmation was received, "I would then be very pleased to meet ... with you or anyone else on the nature of our work at the commission or any other appropriate matters."

The Governor's new chief of staff, William McCoshen, responded to Bartley's fax with a letter confirming the Monday interview "for consideration of a six year appointment to the Tax Appeals Commission." The letter concluded by stating: "Should you choose not to follow the formal interview process, we will assume you are not interested in being considered for the appointment and we will proceed accordingly."[3]

Bartley did not attend the meeting and a few days later was advised by McCoshen that another applicant for the position, Joseph Mettner, was being nominated to the commission.

Finally, the complaint refers to newspaper articles quoting Marion as stating that while Bartley had "pressured very hard" for the appointment, he "was never promised anything." The articles also indicated that Thompson's reason for failing to renominate Bartley to the commission was his

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[3] Bartley alleges that about this time he also received a telephone call from Musolf encouraging him to attend the meeting and noting that he (Musolf) was aware that Mark Bugher, Secretary of the Department of Revenue, was "unhappy ... because of the [pension] [c]ase."

"refus[al] to go through the [appointment] process ...."

Bartley seeks compensatory damages for the Governor's breach of his "contract" to renominate Bartley to the commission "in the amount equivalent to six years' lost wages and fringe benefits ... plus reasonable additions ... and interest ... as well as litigation costs." He seeks damages in the same sum for the Governor's alleged violation of his civil and constitutional rights, together with punitive damages, attorney's fees and costs. He appeals from the trial court's judgment dismissing his complaint for failure to state a claim on which relief may be granted.

I. Standard of Review

A motion to dismiss a complaint for failure to state a claim upon which relief may be granted tests the legal sufficiency of the pleading. Evans v. Cameron, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). Because the question presented is one of law, we review the trial court's decision *de novo*. Williams v. Security Sav. & Loan Ass'n, 120 Wis.2d 480, 482, 355 N.W.2d 370, 372 (Ct. App. 1984). And while we take the pleaded facts and all reasonable inferences from those facts as true, "legal conclusions and unreasonable inferences need not be accepted." Morgan v. Pennsylvania Gen. Ins. Co., 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). Because pleadings are to be liberally construed, "[a] complaint should be dismissed as legally insufficient"

only if it is quite clear that under no conditions can the plaintiff recover" based on the facts (and inferences) alleged. Williams, 120 Wis.2d at 483, 355 N.W.2d at 372 (footnote omitted). This is such a case.

II. Bartley's Contract Claim

The trial court ruled that Bartley's attempt to state a cause of action against the Governor for breach of contract failed for lack of consideration.[4]

Bartley claims that the fact that he gave up his part-time law practice to accept the initial one-year appointment constitutes adequate consideration for the Governor's "promise" to renominate him to a full

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[4] We note at the outset that the inflammatory and unprofessional tone of Bartley's brief does little to advance his legal arguments. Among other things, he accuses the Governor and/or his counsel of "deliberately conceal[ing]" facts and "deliberately misrepresent[ing]" the claims in the case to this court, and generally engaging in "sleazy 'advocacy'" and "adulterat[ing] the truth." At one point he states that "[t]he Governor and his lawyer have a bad habit of deliberately concealing relevant law." At another, he impugns the quality of the Governor's legal education, characterizes his arguments as "inane," "bogus" and "outrage[ous]," and states that he "despairs over the low quality of advocacy here."

No one escapes the vitriol. Using a "storm-trooper" analogy, Bartley claims that the trial court's decision "makes hash" out of the law and that the judge "ignored" and failed to come to grips with his arguments in the case. He accuses Musolf of "very serious impropriety," and dismisses the person who was appointed to the commission in Bartley's stead as a "rookie lawyer." We can only speculate how we ourselves will be characterized should Bartley seek review of our decision in the supreme court.

six-year term the following year. The trial court concluded that because state law flatly prohibits full-time commissioners from engaging in private employment, Bartley had not promised to do anything in exchange for the Governor's alleged promise that he was not otherwise required to do under state law.

Bartley does not dispute the general rule that a promise to do something the promisor is already legally bound to do, or the performance of an existing legal obligation, does not constitute sufficient consideration for a contract. Holcomb v. United States, 622 F.2d 937, 941 (7th Cir. 1980).[5] He argues, however, that the rule is inapplicable because he made his "deal" with the Governor in December 1991, before accepting the interim appointment. Thus, says Bartley, he had a legal right to practice law at the time the "contract" was made and gave up that right a few weeks later, on January 1, 1992, when he took office pursuant to that appointment. He maintains that we may not look past the December date in analyzing whether consideration existed for the alleged agreement. We disagree.

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[5] The rule, which has been described as "the traditional and rigorously logical view," is that obtaining in the "majority of courts," state and federal. CALAMARI & PERILLO, CONTRACTS, 149 (2d ed. 1977), quoted in General Intermodal Logistics v. Mainstream Shipyards & Supply, Inc., 748 F.2d 1071, 1075 (5th Cir. 1984). See also 17A Am. Jur. 2d Contracts §144 (1991).

As noted above, the part-time commissioner position Bartley occupied in the years before his purported agreement with the Governor permitted him to practice law "on the side." As he alleges in his complaint, however, the two part-time positions on the commission were abolished by the legislature in mid-1991, and the three full-time positions that remained carried a prohibition against any outside employment.

That left Bartley with only two choices: to leave the commission or to seek appointment to one of the remaining full-time positions that had fortuitously opened up when an incumbent resigned. As a matter of law, if he wanted to continue on the commission he could do so only upon relinquishing his law practice; he elected to do so, seeking and accepting nomination and appointment for the year remaining on the resigning commissioner's term. The requirement that he give up his practice was not one imposed by the Governor——the person Bartley claims was the only other party to his "contract"; it was imposed by the legislation creating the commission and defining its membership and powers. Knowing that neither he nor anyone else could serve on the commission and still maintain a law practice, Bartley took the job.

The trial court could properly conclude on these facts that his attempt to assert a breach-of-contract claim against the Governor failed for lack of consideration.

Aside from traditional precepts of contract law, Bartley's claim is groundless because it assumes that appointment to public office is something a Governor can barter or contract away. It is true that English common law considered public office as an "incorporeal hereditament grantable by the Crown in which the holder acquired and had an estate." State ex re. Bonner v. District Court, 206 P.2d 166, 169 (Mont. 1949). See 63A Am Jur. 2d Public Officers and Employees §8 (1984). But that has never been so in the United States.

> [A]ppointments to offices of public trust have never been considered as contracts which the sovereign authority was not competent to rescind or modify.
>
> ... Public offices are not created by contract .... [They] are created by public laws, for public political purposes, and filled by appointments made in the exercise of political power.

Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 611-12, 616 (1819).

The very nature of the concept of public office and its relation to the public is inconsistent with either a property or a contract right in the office. Mecham v. Gordon, 751 P.2d 957, 962 (Ariz. 1988). The office belongs to the people, not to the officeholder or the appointing authority. Bonner, 206 P.2d at 169. And that is why the law invalidates any

"bargain" made by a public official to appoint a particular person to office.

> "It is the duty of the officer having a power of appointing ... to make the best appointment in his power according to his judgment at the time when he makes the appointment. The public have a right to demand this .... [T]he public good would be injured if a promise to make an appointment were held to be legally binding, so as to control the exercise of that judgment which the appointing officer ought to exercise when he makes an appointment.... [T]he right of appointment is not the property of the appointing officer. And he has no right to barter it, or to dispose of it. It is merely a political power entrusted to him, to be exercised, not to be sold."

Hall v. Pierce, 307 P.2d 292, 299-300 (Ore. 1957) (quoting Mechem's Public Offices and Officers, §350 (1890)). The Hall court went on to conclude:

> We do not believe that a public officer, who has authority to appoint another to a salaried berth, can enter into a bargain ... whereby he will appoint [one person] and no other.

Id. at 301.

We conclude, therefore, that Bartley's claim that he had a binding contract with Thompson to appoint him to a full term on the Wisconsin Tax Appeals Commission has no basis in law.[6]

III. The Constitutional Claim

Bartley's complaint alleges that the Governor's failure to renominate him to the commission in the wake of the pension case decisions constituted a "malicious" interference with his right to free speech in the "performance of his lawful duties as a commissioner" guaranteed him by the first amendment to the United States Constitution. The trial court, citing Pickering v. Board of Education, 391 U.S. 563 (1968), ruled that the allegations failed to state a first amendment claim because in his decisions in the pension case Bartley was speaking not as a "citizen," but in a governmental capacity. Bartley contends that the trial court misread Pickering because the case contains no such "citizen-speech" requirement.

Even accepting the truth of Bartley's allegation that he was not renominated to the commission because of his participation in the pension case decisions, we nonetheless conclude that he has not stated a first amendment claim.

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[6] Because we so hold, we do not address the Governor's several alternative arguments for dismissal of Bartley's breach of contract claims.

In Pickering, a teacher was fired after sending a letter to a local newspaper criticizing a school board proposal to increase taxes to build two new schools. The Supreme Court reversed lower court decisions holding that the teacher had failed to state a first amendment claim in challenging his dismissal, concluding that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work ...." Id. at 568 (emphasis added). Recognizing that the government, as an employer, "has interests ... in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," the Court attempted to strike a balance "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. (emphasis added).

Bartley argues that the Court's references to the public employee speaking "as a citizen" were simply descriptions of the facts to the case and do not carry any legal significance. At least two federal appellate courts have decided otherwise.

In Egger v. Phillips, 710 F.2d 292, 316 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983), the

Seventh Circuit held that "the content of an employee's speech naturally affects his superior's assessment of him and forms the basis of personnel decisions." Egger was an FBI agent who came to believe during the course of an investigation that one of his colleagues had acted improperly, and reported to his superiors that the other agent had committed perjury and accepted bribes. When Egger was transferred for making the accusations, he sued his superiors claiming, among other things, that the transfer violated his free speech rights. In affirming the dismissal of Egger's claim, the court recognized that his accusations against his co-employee "implicated [his] interests as a concerned citizen." Id. at 317. The court went on to state, however, that because Egger's actions were undertaken in the course of his work on the investigation and represented "professional" activities, they also "implicate[d] internal agency concerns," which eventually tipped the Pickering balance in favor of the defendant employer. Egger's lawsuit was dismissed. Id. at 317-18.

The second case, Marquez v. Turnock, 967 F.2d 1175 (7th Cir. 1992), involved a state employee, Marquez, who claimed he was fired from his position at Illinois Emergency Medical Services (EMS) for critizing the manner in which his supervisor ran the office. The district court directed a verdict dismissing the action, concluding that because Marquez was not speaking "as a citizen" and his

statements did not involve a "matter of public concern," he had not stated a first amendment claim. Id. at 1177. The court of appeals affirmed, noting that while it was difficult to accept that Marquez was not speaking on a matter of public concern in the matter, "the district court's conclusion that [his] statements were not made 'as a citizen' seems well-taken." Id. at 1178.

> As noted, virtually all of Marquez's criticisms ... stemmed from [a] disagreement about how violations of the EMS regulations should be handled. In speaking on this issue, Marquez did not act simply as a member of the general public; it was his job to investigate such violations and make recommendations as to the appropriate response.

Id. (emphasis in the original).[7]

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[7] In his brief, Bartley cites Burkes v. Klauser, 185 Wis.2d 308, 517 N.W.2d 503 (1994), *cert. denied*, 115 S. Ct. 1102 (1995), in support of his first amendment claim. In that case the supreme court recognized that criticisms voiced by an employee of the state investment board that the board was misusing public funds enjoyed first amendment protection as "speech ... [on] a matter of public concern." Id. at 334-35, 344, 517 N.W.2d at 514. Whether Bartley's decisions may be considered such speech in the context of a first amendment claim——a point we need not and do not decide on this appeal——Bartley, unlike the plaintiff in Burkes, was not speaking as a citizen/public employee on possible misfeasance by a public agency. He was, as were the plaintiffs in Egger and Marquez, simply doing what his position required him to do: decide contested cases brought before the quasi-

While the Marquez court's statement is *dictum* in that it was not essential to its decision in the case,[8] we think the reasoning is sound. As in Marquez, it was Bartley's *job* to participate in the decision of cases coming before the commission and, when assigned to do so, to write opinions announcing the decisions. We have concluded that Bartley's allegations that he had a contract for renomination to the commission fail to state a claim. And if we were to hold, as Bartley urges, that the Governor's decision not to renominate him for another term is constitutionally impermissible, no appointed official could be dismissed, or denied reappointment, on the basis of his or her performance in the job.

While some might not find any public merit in the decision to deny Bartley renomination to the commission, the conclusion is inescapable that the Governor is possessed of the wholly discretionary power to nominate persons to appointive positions in government. In making his own judgment on Bartley's application for reappointment, the Governor was within his rights to consider the decisions

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judicial body of which he was a member. Burkes does not advance Bartley's argument on the constitutional issue.

[8] The court concluded that, to the extent Marquez may have had a protected interest in making his statements, that interest was outweighed——in the Pickering balance——by the state's interest in the efficient functioning of the office. Marquez v. Turnock, 967 F.2d 1175, 1179 (7th Cir. 1992).

written by Bartley, the soundness of Bartley's legal reasoning and the quality of his legal conclusions as expressed in those decisions. In his brief, the Governor aptly paraphrases Egger: "[Bartley] was simply doing his job as a [tax appeals commissioner], and the quality of that work was something [the Governor] routinely had to assess. [The Governor] necessarily evaluated the soundness of [Bartley's] work regarding [the pension case] in this professional environment." See Egger, 710 F.2d at 318. That others might disagree with Thompson's evaluation of Bartley does not diminish the discretion possessed by the Governor to appoint, or not to appoint, specific persons to public office.

The worst that can be said about the Governor's action, if in fact he declined to renominate Bartley because of his decisions in the pension case, is that it was politically motivated. And while the attachments to Bartley's complaint indicate that he enjoys widespread respect as an attorney and government official, nothing in the statutes requires that respected——or even competent——persons be appointed or reappointed to high state office or that gubernatorial nominations or renominations to such positions be free of political considerations. Nomination to offices such as tax appeals commissioner are "political" in that they are wholly discretionary with the Governor, and

"[p]olitics," as Mr. Dooley said nearly a century ago, "ain't beanbag."[9]

IV. Conspiracy

Bartley's complaint characterizes the statements to him by Marion, Reuter and Musolf as "constit[ing] threats ... that he would lose his job as commissioner if he persisted in [his] ruling[s] in ... the Pension Case ...." He claims these "threats" were made in the course of a conspiracy among the Governor, his staff and Musolf and "were maliciously and conspiratorially designed" to "prevent or hinder Bartley in the performance of his lawful duties, in violation of §134.01 Wis. Stats."[10]

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[9] FINLEY PETER DUNNE, Mr. Dooley's Opinions, R. H. Russel (1901).

[10] Section 134.01, Stats., makes it a crime for any two or more persons to "combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his or her reputation, trade, business or profession ... or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act ...."

Bartley's complaint also alleged a conspiracy to "influence the outcome of the Pension Case in violation of §227.50(1), Wis. Stats.," which prohibits parties, interested agency officials or other persons with a substantial interest in a contested case being heard before an agency from making *ex parte* threats, "offers of reward," or communications on the merits of the case, to any agency decision maker. While isolated portions of Bartley's brief to this court suggest a conspiracy claim——he states at one point, for example, that "the Governor's office ... was itself very active in its attempts to influence

For a conspiracy to exist, there must be, at a minimum, "facts that show some agreement, explicit or otherwise, between the alleged conspirators on the common end sought and some cooperation toward the attainment of that end." Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis.2d 207, 216, 249, N.W.2d 547, 552 (1977). It is not enough that the defendants may have acted in concert or with a common goal. Sparkman v. McFarlin, 601 F.2d 261, 268 (7th Cir. 1979) (en banc). It is true, as Bartley argues, that the rules of civil procedure require a plaintiff to plead only "[a] short and plain statement of the claim ... showing that the pleader is entitled to relief." Section 802.02(1)(a), Stats. Even with "notice pleading," however, "a general allegation of conspiracy, without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." McCleneghan v. Union Stock Yards Co., 298 F.2d 659, 663 (8th Cir. 1962). See Cairo v. Skow, 510 F. Supp. 201, 206 (E.D. Wis. 1981).

The trial court concluded that because the Governor, Reuter and Marion were all members of a

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Bartley and the outcome of the pension case" and, at another, that "Musolf and the Governor were acting in concert in trying to get Bartley to throw the pension case"——he never develops a legal argument on the issue, and we therefore need not consider it. See Polan v. Department of Revenue, 147 Wis.2d 648, 660, 433 N.W.2d 640, 645 (Ct. App. 1988) (court of appeals declines to review issues where arguments are not "developed themes reflecting ... legal reasoning" but are "supported by only general statements").

single governmental entity, they could not, as a matter of law, engage in a conspiracy.[11] And, concluding that there was nothing in the statements Musolf allegedly made to Bartley to support a reasonable inference that Musolf was acting "in concert with the Governor," the court rejected Bartley's argument that the involvement of Musolf as an "outside actor" was sufficient to take the case out of the "intracorporate conspiracy" rule of Ford Motor Co. v. Lyons, 137 Wis.2d 397, 405, N.W.2d 354 (Ct. App. 1987), and similar cases.

On appeal, Bartley appears to concede that the Governor and his staff, being part of the same office or entity, cannot be guilty of a conspiracy in the pursuit of a common goal. Instead, he grounds his conspiracy argument on his assertion that Musolf's alleged remarks to Bartley, "How can you do this when your reappointment is up?" and "You're making a laughingstock of the commission," are sufficient, in and of themselves, to support the inference that the Governor had "pressured" Musolf to call Bartley and threaten non-reappointment in order to get him to

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[11] See Ford Motor Co. v. Lyons, 137 Wis.2d 397, 426-31, 405 N.W.2d 354, 366-68 (Ct. App. 1987) (section 134.01, Stats., incorporates the rule that parties, such as a parent corporation and its subsidiaries, who have a unity of interest and common objectives, cannot be guilty of a conspiracy as a matter of law). We see no reason why the rule would not be equally applicable to defendants within a single governmental unit such as the executive office. See, e.g., Cromley v. Board of Education, 699 F. Supp. 1283, 1291-92 (N.D. Ill. 1988).

change his rulings in the pension case. As a result, Bartley argues that he has adequately pleaded a claim that the Governor and Musolf conspired to obstruct and hinder him in the performance of his duties as a tax appeals commissioner.

To get from Musolf's remark to a Thompson/Musolf conspiracy, we must first infer that the remark constituted a "threat" to deny him renomination because of his written decisions and, second, that it was made at the Governor's instigation. Bartley's argument simply assumes the former and asks us to infer the latter because: (1) only the Governor, not Musolf, possesses the power to nominate persons to the commission; (2) Musolf could not have known "that Bartley's renomination was in jeopardy except through contact with the Governor"; and (3) the only "logical motivation" for Musolf's call would be "great" and "overwhelming" pressure from the Governor because the call was allegedly a violation of "the canons of ethics"——a prohibited *ex parte* contact within the meaning of §227.50(1)(a), Stats.[12] We are unwilling to make

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[12] As indicated, *supra*, note 9, the statute prohibits interested parties from threatening or offering rewards to agency decision makers hearing contested cases.

Bartley also asserts that Musolf's "laughingstock" remark is additional evidence of the pressure put on him by the Governor to make the call: that "Musolf was being subjected to the brunt of the Governor's unhappiness with Bartley." We think the assertion adds nothing of substance to his arguments.

such a leap.

There is nothing in Musolf's statement, or any of the circumstances that might reasonably be inferred from it, that Governor Thompson was even aware that it was made, much less that the Governor and Musolf had agreed that it should be made——or that the Governor exerted, in Bartley's words, "great" and "overwhelming" pressure on Musolf to make the call to Bartley. Bartley does not ask us to draw a reasonable inference in this respect; he asks us to speculate. We think the same is true with respect to Musolf's reference to Bartley's appointment being "up." Bartley argues that the inference from the remark is that Musolf was telling him, as the Governor's messenger, that his renomination was in jeopardy because of the Governor's "unhappiness" with his part in the rulings in the pension case.

It would be well known to Musolf, as chairman of the commission, not only that Bartley's initial term was ending but also that the pension case rulings were controversial, to say the least, in state government circles. Here, too, we do not see how it reasonably may be inferred from Musolf's unadorned remark that Bartley's appointment was "up" that he and the Governor were engaged in a conspiracy of the type Bartley suggests.

Even if Bartley's allegations could be considered as raising a reasonable inference that the Governor had communicated to Musolf some degree of unhappiness with Bartley's actions in the pension

case, Bartley has not persuaded us that those allegations reasonably give rise to an inference that the Governor and Musolf had entered into an agreement or combination to obstruct Bartley in the performance of his duties on the commission. "Mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish the existence of a conspiracy." Wis J I——Civil 2800 (1991).

The trial court did not err in dismissing Bartley's complaint.

By the Court.——Judgment affirmed.

Recommended for publication in the official reports.

A. 3 1-12 TRIAL COURT DECISION

STATE OF WISC. CIRCUIT COURT DANE COUNTY
BRANCH 11

DOUGLASS H. BARTLEY,

Plaintiff,

v. Case No. 94-CV-0745

TOMMY G. THOMPSON,

Defendant.

MEMORANDUM DECISION

On March 3, 1994, plaintiff Douglass H. Bartley filed a complaint which presented four causes of action seeking to impose individual liability against the Governor of the State of Wisconsin, Tommy G. Thompson. The four causes of action allege breach of contract, obstruction, denial of constitutionally-protected property rights and denial of constitutionally-protected free speech rights. The latter two counts seek redress under 42 U.S.C. §1983; the obstruction count alleges acts in violation of secs. 134.01, and 227.50(1), Stats. Now before the Court is the Governor's Motion to Dismiss.

FACTS

A motion to dismiss tests the legal sufficiency of the complaint. When deciding such a motion, the Court liberally construes the complaint and grants

the motion only when it is clear that there are no conditions under which the plaintiff may recover. Wagner v. Dissing, 141 Wis.2d 931, 936 (Ct. App. 1987). Thus the facts pled in the complaint are assumed to be true for purposes of the motion. Evans v. Cameron, 121 Wis.2d 421, 426 (1985).

In 1991 Bartley was a part-time Commissioner on the Tax Appeals Commission (TAC), serving a six year term which would expire on June 30, 1993. He obtained this position pursuant to nomination by the Governor and confirmation by the State Senate. When one of the full-time TAC Commissioners resigned, Bartley applied to fill the unexpired portion of her term.

In December of 1991 he met with Edward S. Marion, the Governor's chief-of-staff, to work out the details of the full-time TAC appointment. Bartley alleges that Marion represented to him that the Governor had turned the matter of Bartley's appointment over to him to resolve. Bartley, concerned that he would have to give up the private practice of law to accept the appointment, told Marion that he would accept the TAC position only with the express promise that he would be reappointed by the Governor for a full six-year term. That term would begin on March 1, 1993. Marion allegedly informed Bartley that he would check with the Governor.

On or about December 13, 1991, Marion allegedly notified Bartley that he was authorized to

offer appointment, that the Governor agreed to reappoint Bartley to a six-year term beginning March 1, 1993, and the appointment was secure in Marion's words, "as long as [Bartley] didn't do anything unnatural with sheep." Bartley relied upon Marion's representations. Shortly after the conversation with Marion, Bartley was contacted by the Governor and asked if he was happy. Bartley replied that he was.

On or about December 30, 1991, the Governor notified Bartley by letter that he had been nominated for the interim term which expired March 1, 1993. The letter advised Bartley that his salary would be $61,000 per year, and that the nomination required Senate confirmation. No reference was made to the allegedly promised reappointment to a subsequent six year term.

The Senate confirmed Bartley's nomination and he began serving as a full-time TAC Commissioner on January 2, 1992. Bartley also gave up his law practice, as mandated by sec. 15.06(3), Stats. A large taxpayer refund case involving federal retirees was assigned to him.[1] The case represented potential liability of as much as $100,000,000 by the State of Wisconsin for taxpayer refunds. On May 18, 1992, a TAC ruling, written by Bartley, held that the TAC had jurisdiction over the refund claims. The Department of Revenue sought

[1] Throughout this decision the court will refer to that action as the "federal refund case."

to set aside the ruling, and the taxpayers sought certification as a class. On October 28, 1992, Bartley authored another TAC opinion, which affirmed the earlier TAC decision and held that the taxpayers could proceed as a class.

On October 30, 1992, Marion called Bartley to inform him that the Department of Revenue was "very upset" with the rulings. After Bartley and another TAC Commissioner issued additional rulings in November, [1992,] TAC Commissioner Musolf contacted Bartley about the refund case, and said, "How can you do this when your appointment is up?"

On February 23, 1993, Bartley sent a letter to the Governor's appointment secretary, Patricia Reuter, suggesting a salary schedule for the appointment term to begin March 1, 1993. On March 2, 1993, Reuter called Bartley and told him that the Governor was not amused by his letter and that the appointment to the TAC term commencing March 1, 1993, was not secure. Bartley told Reuter that Marion, on behalf of the Governor, had promised him reappointment. Reuter said she would discuss the matter with the Governor and get back to Bartley.

On March 6, 1993, Bartley spoke to Marion, who confirmed that Bartley had been promised a six-year reappointment, and told Bartley that he had mentioned the reappointment agreement to Reuter. Marion allegedly told plaintiff that he would remind the Governor that evening of the promised reappointment.

On March 24, 1993, Reuter asked Bartley to attend an interview on March 29, 1993, to discuss Bartley's goals and objectives. Bartley asked Reuter whether Marion had confirmed the promised reappointment, and Reuter replied, "Not exactly."

Bartley initially agreed to the interview, but reconsidered his decision the next day. He had two concerns: (1) that the interviewers would want to talk about the federal refund case; and (2) that the interview was intended as window dressing to justify firing him because of his rulings in that case. On Friday, March 26, 1993, Bartley sent Reuter a letter declining the request to appear for the interview, and offering to discuss the TAC's work after confirmation of his reappointment.

On Monday, March 29, 1993, Bartley received a notice from the Governor's then chief-of-staff, William McCoshen, requesting that Bartley attend the interview scheduled for that afternoon. Bartley was informed that he should contact Reuter if he needed to reschedule. The notice further stated that "should you choose not to follow the formal interview process, we will assume you are not interested in being considered for the appointment and we will proceed accordingly." That same day, TAC Commissioner Musolf contacted Bartley, urged him to attend the interview, and mentioned that he knew Department of Revenue Secretary Mark Bugher was upset with Bartley because of his rulings in the refund case. Bartley explained to Musolf why he

thought he could not attend. On April 1, 1993, McCoshen notified Bartley that Joseph Mettner would be nominated for the TAC position.

DISCUSSION

I. Bartley's Breach of Contract Claim.

The Governor asserts four arguments in an effort to dismiss Bartley's claim that the Governor breached their alleged oral contract. These arguments raise issues regarding sovereign immunity, the parol evidence rule, the statute of frauds, and the extent of Governor's authority. The Court agrees with the Governor that Bartley's breach of contract claim should be dismissed, but not for the reasons argued in the briefs.

Bartley's claim of breach of contract fails because there was no valid contract. Accepting the allegations in the complaint as true, Bartley's consideration for the Governor's promise to renominate him for the subsequent six-year TAC term consisted of Bartley's agreement to give up his law practice and to refrain from "do[ing] anything unnatural with sheep."

The general rule is that a promise to do something which the promisor is already legally obligated to do does not constitute consideration for a contract. Holcomb v. U.S., 622 F.2d 937, 941 (7th Cir. 1980). In paragraph 14 of his complaint, Bartley acknowledges that he was required by sec.

15.06(3)(a), Stats., to give up his law practice in order to become a full-time TAC Commissioner.[2] The fact that the alleged "sheep covenant" is proscribed by Wisconsin law deserves no further comment. Even if it is interpreted as a promise by Bartley not to engage in misconduct, the Court finds that to be invalid consideration. In the end, Bartley promised nothing that he was not already legally required to do (or to refrain from doing). There can be no claim for breach of contract when there is no contract upon which to base a cause of action.

II. Bartley's Obstruction Claim

Count II of Bartley's complaint alleges that ex parte communications by the Governor, made through Marion, Reuter and Musolf, constituted threats to Bartley that he would lose his position on the TAC if he made additional rulings against the State in the federal refund case. According to the complaint, these communications were "maliciously and conspiratorially designed to prevent or hinder Bartley in the performance of his lawful duties, in violation of §134.01 Wis. Stats." the civil conspiracy statute.[3] [4]

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[2] Section 15.06, Stats., provides in pertinent part: (3) Full-time offices. (a) A commissioner may not hold any other office or position of profit or pursue any other business or vocation, but shall devote his or her entire time to the duties of his or her office.

[3] Complaint, paragraphs 53 and 54.

The Governor has raised five arguments in support of dismissing this portion of Bartley's complaint. Because the Court finds the intracorporate conspiracy doctrine issue dispositive, it does not reach the Governor's other issues.

Under the intracorporate conspiracy doctrine, it is impossible for members of a single entity to conspire. That is because such an entity naturally acts through its natural person managers, and the concerted action of those persons constitutes the acts of the entity. In the instant case Reuter, Marion and the Governor are all members of a single governmental entity, the Governor's office. Thus, they cannot engage in a conspiracy as a matter of law. Rubenstein v. University of Wisconsin Board of Regents, 422 F. Supp. 61, 64 (E.D. Wis. 1976). The doctrine has been followed by Wisconsin courts. See, e.g., Ford Motor Co. v. Lyons, 137 Wis.2d 397, 426 (Ct. App. 1987).

Bartley relies on the alleged participation of TAC chairman Musolf in order to introduce an "outside actor" into his conspiracy claim and thus

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[4] Sec. 134.01, Stats., provides as follows: Injury to business; restraining of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

circumvent the intracorporate conspiracy doctrine. The basis for Bartley's allegation regarding Musolf is that he called Bartley and said, "How can you do this when your appointment is up? ... You're making a laughing stock of the Commission."[5] In Bartley's view, "Musolf's very words show that the call was ordered by the Governor or 'inspired' by a gubernatorial tempest that Musolf ... felt compelled to relay to Bartley."[6] Bartley asserts that this statement raises a reasonable inference that the Governor induced Musolf to make this comment to Bartley with the ultimate goal of influencing Bartley to rule in the State's favor in the federal refund case.

Bartley is correct in that a complaint is entitled to all reasonable inferences in its favor.[7] In the instant case, however, there is simply nothing in Musolf's statement to support such an inference that Musolf was acting in concert with the Governor. Bartley's conspiracy claim is little more than a conclusory allegation of conspiracy built upon mere speculation regarding what could motivate Musolf to make such a statement. Therefore, the Court concludes that Bartley's civil conspiracy claim is insufficient to sustain Count II of his complaint.

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[5] Complaint paragraph 24.

[6] Bartley's Brief in Opposition at 10.

[7] Kramer v. Horton, 125 Wis.2d 177 (Ct. App. 1985).

III. Bartley's Claim of Denial of Property Rights

According to the United States Supreme Court, in order to state a cause of action under §1983, a plaintiff need only allege that he has been deprived of a federal right by someone acting under color of state or territorial law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Superficially, Bartley's complaint meets the Gomez requirements. However, his claim regarding denial of property without due process rests upon an insufficient foundation. As the Court concludes in Section I of this decision, there was no valid contract between Bartley and the Governor. Without a contract, Bartley has no contract rights and no basis on which to claim denial of property in violation of the 14th Amendment.

IV. Bartley's Claim of Retaliation for Protected Speech

Count IV of Bartley's complaint alleges that the Governor sought to "obstruct, prevent, or hinder Bartley in the performance of his lawful duties as a commissioner," and thus deprived Bartley of his free speech rights.[8] To successfully make such a claim in the context of a public employment case, the plaintiff must first establish that "[the employee], as a citizen, [is] commenting on matters of public

[8] Complaint, paragraphs 64 and 65.

concern." Pickering v. Board of Education, 391 U.S. 563, 568 (1968).[9]

Bartley asserts that his rulings made as a TAC Commissioner in the federal refund case constitute speech on a matter of public concern. However, this argument ignores the Pickering requirement that the public employee be speaking as a citizen. It was the essence of Bartley's job as a TAC Commissioner that he issue rulings in the cases before him. Rather than engaging in free speech as a citizen, Bartley was actually speaking as the voice of the TAC. Under such circumstances, this Court concludes that

[9] Although the Court does not reach them in this decision, the other elements of a free speech public employment analysis were described by the Wisconsin Supreme Court in Barnhill v. Board of Regents, 166 Wis.2d 395 (1992):

> "Second, if the statement satisfies the public concern inquiry, the court must then balance the interests of the employee in making the statement against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public. Third, assuming that both previous elements have been found in favor of the plaintiff, he or she must then prove that the protected speech 'was a motivating factor in the detrimental employment decision.' Fourth, and finally, if plaintiff makes this showing, the burden then shifts to the employer to show by a preponderance of evidence that it would have reached the same decision in the absence of the protected activity ... Id. at 417-18.

it is improper to characterize Bartley's TAC rulings as speech on a matter of public concern.[10]

CONCLUSION

For the reasons stated above, the Governor's Motion to Dismiss is hereby GRANTED in respect to all four counts of Bartley's Complaint.

Dated this 28th day of October, 1994.

BY THE COURT:

Hon. Daniel R. Moeser
Circuit Judge, Branch 11

cc: Atty. Gaar W. Steiner
AAG Bruce A. Olson

[10] Other courts have discussed the distinction between speech made within the scope of the plaintiff's employment responsibilities and speech made as a private citizen in public employment cases. See Egger v. Phillips, 710 F.2d 292, 316-18 (7th Cir.) (en banc), cert. den. 464 U.S. 918 (1983); Marquez v. Turnock, 967 F.2d 1175, 1178-79 (7th Cir. 1992).